

United States District Court
For the Northern District of California

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6 TRAVELERS PROPERTY CASUALTY
7 COMPANY OF AMERICA,

8 Plaintiff,

9 v.
10 KFx MEDICAL CORPORATION,
11 Defendant.

12 No. C 13-00710 JSW

13 **ORDER REGARDING MOTION
TO DISMISS AND CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

14 _____ /
15 Now before the Court is the motion to dismiss filed by Defendant KFx Medical
16 Corporation (“KFx”) and the cross-motions for partial summary judgment by KFx and by
17 Plaintiff Travelers Property Casualty Company of America (“Travelers”). Having carefully
18 reviewed the parties’ papers, considered their arguments and the relevant legal authority, the
19 Court hereby denies KFx’s motion to dismiss, denies KFx’s motion for partial summary
20 judgment, and grants Travelers’ cross-motion for partial summary judgment.¹

21 **BACKGROUND**

22 In this action Travelers seeks a declaration that it does not owe a duty of coverage to
23 KFx in an underlying lawsuit between KFx and Arthrex, Inc. (“Arthrex”). In the underlying

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27 ¹ The Court notes that in its motion for summary judgment, KFx improperly
incorporates sections from its prior briefing in support of its motion to dismiss.
28 Incorporating argument from another brief is an inappropriate attempt to evade the page
limitations, which were already extended from twenty-five to thirty-five pages. KFx is
admonished to comply with the Court’s orders and that future violations will be sanctioned.

The Court GRANTS the parties’ requests for judicial notice (“RJN”). See Fed. R.
Evid. 201.

1 lawsuit, KFx filed a patent infringement action against Arthrex. Arthrex, in turn, filed
2 counterclaims against KFx seeking declaratory relief.

3 The Court will address additional facts as necessary in the remainder of this Order.

4 ANALYSIS

5 A. Applicable Legal Standards.

6 1. Motion to Dismiss.

7 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
8 pleadings fail to state a claim upon which relief can be granted. The Court’s “inquiry is limited
9 to the allegations in the complaint, which are accepted as true and construed in the light most
10 favorable to the plaintiff.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).
11 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a
12 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than
13 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
14 do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478
15 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is
16 conceivable but must instead allege “enough facts to state a claim to relief that is plausible on
17 its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content
18 that allows the court to draw the reasonable inference that the defendant is liable for the
19 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at
20 556).

21 2. Motion for Summary Judgment.

22 A principal purpose of the summary judgment procedure is to identify and dispose of
23 factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).
24 Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and
25 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
26 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R.
27 Civ. P. 56(a). “In considering a motion for summary judgment, the court may not weigh the
28 evidence or make credibility determinations, and is required to draw all inferences in a light

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1 most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.
2 1997).

3 The party moving for summary judgment bears the initial burden of identifying those
4 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine
5 issue of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact
6 is “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-
7 moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is
8 “material” if it may affect the outcome of the case. *Id.* at 248. Once the moving party meets its
9 initial burden, the non-moving party must go beyond the pleadings and, by its own evidence,
10 “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

11 In order to make this showing, the non-moving party must “identify with reasonable
12 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275,
13 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)
14 (stating that it is not a district court’s task to “scour the record in search of a genuine issue of
15 triable fact”); *see also* Fed. R. Civ. P. 56(e)). If the non-moving party fails to point to evidence
16 precluding summary judgment, the moving party is entitled to judgment as a matter of law.
17 *Celotex*, 477 U.S. at 323; Fed. R. Civ. P. 56(e)(3).

18 **B. Parties’ Motions.**

19 All of the motions raise the same legal issue – whether Travelers’ owes KFx a duty to
20 defend KFx in the underlying lawsuit. California’s substantive insurance law governs in this
21 diversity case. *State Farm Mut. Auto. Ins. Co. v. Khoe*, 884 F.2d 401, 405 (9th Cir. 1989). In a
22 dispute over insurance policy coverage, the burden is on the insured to bring the claim within
23 the basic scope of coverage. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 16 (1995).
24 Under California law, “a liability insurer owes a broad duty to defend its insured against claims
25 that create a potential for indemnity. The carrier must defend a suit which potentially seeks
26 damages within the coverage of the policy.” *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d
27 1264, 1267 (9th Cir. 2010) (quoting *Montrose Chem. Corp. of Cal. v. Superior Court*, 6 Cal. 4th
28 287, 296 (1993)). The insured “need only show that the underlying claim may fall within

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1 policy coverage; the insurer must prove it cannot.” *Montrose*, 6 Cal. 4th at 300. Furthermore,
2 “the insurer’s duty is not measured by the technical legal cause of action pleaded in the
3 underlying complaint, but rather by the potential for liability under the policy’s coverage as
4 revealed by the facts alleged in the complaint or otherwise known to the insurer.”” *Hudson*, 624
5 F.3d at 1267 (quoting *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 606
6 (1986)). In instances where “there is doubt as to whether the duty to defend exists, the doubt
7 should be resolved in favor of the insured and against the insurer.”” *Id.* (quoting *CNA*, 176 Cal.
8 App. 3d at 607). However, “an insured may not trigger the duty to defend by speculating about
9 extraneous ‘facts’ regarding potential liability or ways in which the third party claimant might
10 amend its complaint at some future date.” *Gunderson v. Fire Ins. Exchange*, 37 Cal. App. 4th
11 1106, 1114 (1995). “Although an insurer’s duty to defend is broader than the duty to
12 indemnify, the duty to defend depends upon facts known to the insurer at the inception of the
13 suit.” *Id.*

14 The insurance policy at issue provides coverage for personal and advertising injury
15 arising out of malicious prosecution. KFx argues that malicious prosecution includes claims for
16 abuse of process. Regardless of whether or not this is an accurate statement of California law,
17 the underlying counterclaims against KFx do not include a claim for abuse of process. “[T]he
18 essence of the [abuse of process] tort [is] ... misuse of the power of the court; it is an act done in
19 the name of the court and under its authority for the purpose of perpetrating an injustice.”
20 *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006). To state a claim for abuse of process, a
21 plaintiff must allege “that the defendant (1) contemplated an ulterior motive in using the
22 process, and (2) committed a willful act in the use of the process not proper in the regular
23 conduct of the proceedings.” *Id.*

24 Arthrex brings three counterclaims against KFx. The first counterclaim is for
25 declaratory relief that Arthrex products do not infringe and Arthrex does not contribute to
26 others’ infringement of KFx’s patents-in-suit. The second is for declaratory relief that the
27 claims of KFx’s patents-in-suit are invalid. The third is for declaratory judgment that KFx’s
28 patents-in-suit are unenforceable due to inequitable conduct committed before the United States

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1 Patent and Trademark Office (“PTO”) during prosecution of the applications for KFx’s patents-
2 in-suit. (KFx’s RJD in Support of Its Motion to Dismiss, Ex. 3.) In its prayer for relief, Arthrex
3 seeks an order enjoining KFx “from threatening or charging infringement of, or instituting any
4 action for infringement of the [patents-in-suit] against Arthrex, its suppliers, customers or any
5 distributor or user of its products....” (*Id.*) Arthrex further requests “[s]uch other and further
6 relief, at law or in equity, to which Arthrex is justly entitled.” (*Id.*)

7 KFx contends that the counterclaims allege that KFx had an ulterior motive in filing the
8 lawsuit, either to extort settlements or impede competition. (Mot. to Dismiss at 9; Mot for
9 Partial Summary Judgment at 15.) KFx’s contention fails for two independent reasons. First,
10 even if Arthrex has alleged that KFx had an ulterior motive in filing the lawsuit, such an
11 allegation does not state a claim for abuse of process. Although filing or maintaining a lawsuit
12 for an improper purpose may, “in an appropriate case, give rise to a cause of action for
13 malicious prosecution, the mere filing or maintenance of a lawsuit – even for an improper
14 purpose – is not a proper basis for an abuse of process action.” *Oren Royal Oaks Venture v.*
15 *Greenberg, Berhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1209 (1986); *see also Ramona*
16 *Unified Schl. Dist. v. Tsiknas*, 135 Cal. App. 4th 510, 520 (2005).

17 KFx does not cite any authority to the contrary. In *Verve, L.L.C. v. Hypercom Corp.*,
18 2006 WL 2390505 (D. Ariz. Aug. 16, 2006), the court was applying Arizona law, not California
19 law. In both *Bidna v. Rosen*, 19 Cal. App. 4th 27, 40 (1993) and *Younger v. Solomon*, 38 Cal.
20 App. 3d 289, 297-98 (1974), the courts explained that accusations of misusing the tools the law
21 affords litigants once they are in a lawsuit, such as improper use of discovery or improper
22 attachments, as opposed to merely filing and maintaining the lawsuit, may state a claim for
23 abuse of process. KFx does not even argue that Arthrex made such allegations in its
24 counterclaims.

25 Second, Arthrex does not allege that KFx had an ulterior motive in filing the lawsuit. In
26 its motion to dismiss, KFx seeks to have the Court infer such allegations from Arthrex’s
27 counterclaims. However, Arthrex brings straightforward declaratory relief claims for
28 noninfringement, invalidity, and unenforceability due to KFx’s alleged inequitable conduct

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1 before the PTO. Arthrex does not actually allege that KFx's lawsuit was initiated for an
2 improper purpose. Inferring such an allegation from Arthrex's counterclaims, although creative
3 and imaginative, is not sufficiently grounded in the actual facts alleged.

4 In its motion for partial summary judgment, KFx seeks to "bolster" these absent
5 allegations by pointing to extrinsic evidence. However, the extrinsic evidence does not assist
6 KFx. KFx points to the following statements in Arthrex's opposition to KFx's motion for
7 summary judgment: (1) "Since it could not compete in the marketplace, KFx needed to find
8 another way to generate revenue[;]" (2) "If the '311 Patent was found to be unpatentable, that
9 would essentially be the end for KFx. Without any sales to speak of, KFx could certainly not
10 afford to lose one of its most valuable assets; the '311 Patent[;]" and (3) "It was in this context
11 that Mr. Scott, and KFx's attorney ... devised a strategy to use the reexamination as an
12 opportunity to strengthen the '311 patent and prepare it for litigation." (KFx's Request for
13 Judicial Notice in Support of its Motion for Partial Summary Judgment, Ex. 4.) Too many leaps
14 and inferences would have to be drawn to infer from these statements that Arthrex is accusing
15 KFx of misusing litigation as a method to generate revenue. Although perhaps Arthrex may at
16 some point make such an accusation, it has not yet done so.

17 Moreover, even if such an accusation could be inferred from this extrinsic evidence, this
18 extrinsic evidence cannot be used to demonstrate a claim for abuse of process. "[E]xtrinsic
19 evidence is sufficient to compel an insurer to defend only when the evidence pertains to *claims*
20 *actually asserted* by the third party." *Storek v. Fidelity & Guarantee Ins. Underwriters, Inc.*,
21 504 F. Supp. 2d 803, 811 (N.D. Cal. 2007) (emphasis added) (citing supporting authority). As
22 the court in *Storek* explained, "an insurer owes no duty to defend based upon mere 'speculation'
23 as to claims that a third party might have brought." *Id.* "An insured may not trigger the duty to
24 defend by speculating about extraneous 'facts' regarding potential liability or ways in which the
25 third party claimant might amend its complaint at some future date." *Gunderson*, 37 Cal. App.
26 4th at 1114; *see also Hurley Constr. Co. v. State Farm Fire & Cas. Co.*, 10 Cal. App. 4th 533,
27 538 (1992) ("the insured may not speculate about unpled claims to manufacture coverage.");
28 *Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d 497, 503 (9th Cir.

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1 1993) (“Only amendments that would include new *causes of action* clearly supported by the
2 facts already pled in the complaint may support a finding of potential liability.”) (emphasis in
3 original). As discussed above, Arthrex does not bring any claim for abuse of process or allege
4 any facts which would support a claim for abuse of process.

5 Finally, the “extrinsic facts which may create a duty to defend *must be known by the*
6 *insurer* at the *inception* of the third party lawsuit....” *Gunderson*, 37 Cal. App. 4th at 1114
7 (citing *Montrose Chemical*, 6 Cal. 4th at 295-96). The extrinsic evidence upon which KFx
8 relies is in a brief filed in response to a motion for summary judgment during the course of the
9 litigation, brought after Arthrex filed its counterclaims. This evidence did not exist at the time
10 the counterclaims were filed.

11 KFx’s contention that Arthrex alleges a claim for disparagement fares no better. The
12 insurance policy provides that personal injury includes injury caused by publication of material
13 that “disparages a person’s or organization’s goods, products or services.” (Declaration of Peter
14 B. Bernier, Ex. A.) KFx argues “Arthrex claimed injury from KFx’s statements and in turn
15 sought damages from KFx in court.” (KFx’s Partial Motion for Summary Judgment at 9.) To
16 support this argument, KFx’s relies on the infringement allegations it asserts against Arthrex in
17 its complaint and that Arthrex seeks a declaration of non-infringement and of invalidity and
18 seeks to enjoin KFx’s from threatening or charging infringement. Again, similar to abuse of
19 process, Arthrex’s counterclaims simply do not contain any allegation that KFx published
20 material that disparaged Arthrex’s goods, products or services. Therefore, extrinsic evidence
21 may not be used to establish the publication of any disparaging statements or that Arthrex was
22 concerned about KFx’s statements.

23 Accordingly, the Court finds that Travelers does not have a duty to defend KFx against
24 Arthrex’s counterclaims as the are currently pled. Therefore, the Court grants Travelers’
25 motion for partial summary judgment on its first two claims and denies Kfx’s motion to dismiss
26 and cross-motion for partial summary judgment.

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CONCLUSION

2 For the foregoing reasons, the Court GRANTS Travelers' motion for partial summary
3 judgment on its first two claims, DENIES KFx's cross-motion for partial summary judgment,
4 and DENIES KFx's motion to dismiss.

IT IS SO ORDERED.

Dated: July 12, 2013

Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE